Written Statement of Lynn D. Wardle *0315Draft*

on S. 27 the "Bipartisan Campaign Reform Act of 2001"

Presented on Saturday, March 17, 2001, to the Committee on House Administration of the House of Representatives, Field Hearing in Phoenix, Arizona

Mr. Chairman, and distinguished members of this Committee on House Administration:

My name is Lynn D. Wardle. I am honored to appear before this Committee to present a statement of concern about significant parts of S. 27, called the "Bipartisan Campaign Reform Act of 2001." For identification, I am a professor of law at the J. Reuben Clark Law School, Brigham Young University,[1] and I have written a couple of articles dealing with free speech issues,[2] but I base my testimony today mostly on my research and my experience doing pro bono work with private groups of individuals who wish to influence the shaping of public policy on issues that I believe are very important. I have served a various times on the Board of Directors of the National Right to Life Committee, Americans United for Life Legal Defense and Education Fund, and was President of the Utah Prolife Coalition, to name just three such groups. This written statement and my oral presentation present my own personal opinions; I do not speak for any other person or institution.

Like many Americans, I believe that there is a need for reform of federal campaign and campaign finance laws. As a young law clerk for Judge John J. Sirica in Washington, D.C., during the Watergate Cover-Up and related cases (1974-1975), I learned of the corrosive effect of huge amounts of undisclosed money in political campaigns, of secret transfers of large sums of money in brown paper bags by a "bag man," and concealed "slush funds" used for illegal or unethical practices such as wiretapping, spying, political pay-offs, or to buy silence from defendants or witnesses. In recent years, like many others, I have been concerned again about sleazy fund raising activities involving inappropriate or questionable use of government facilities (such as the alleged use of White House bedroom accommodations for political donors), and solicitation or receipt of questionable foreign donations for political campaigns. I have been concerned by extreme and excessive expenditures in financially one-sided campaigns which appear to "buy" some elections through dominance of the media. Media bias and distortion are other grave concerns when they effectively blocks access by the voters to the speech and viewpoints of candidates for public office.

---

[1] I graduated from Brigham Young University in 1971 (B.A.) and from Duke University School of Law in 1974 (J.D.). I was on the Duke Law Review and on the Duke Law School Moot Court Board of Advocates. I served as a law clerk to the Hon. John J. Sirica of the U.S. District Court for the District of Columbia from May 1974 through August 1975 (during the Watergate coverup case and some related cases), practiced civil litigation with the law firm of Streich, Lang, Weeks, Cardon & French (now Quarles & Brady Streich Lang) in Phoenix, Arizona from 1975-1978 (representing corporate and individual clients in a variety of commercial cases), and also worked in the U.S. Department of Justice, Civil Division, Federal Programs Branch in Washington, D.C. (Professor-in-Residence, 1989-90) (representing federal agencies sued in federal courts). Since joining the faculty of the Brigham Young University School of Law in 1978 I have taken over 100 pro bono cases, and written nearly a dozen *amicus curiae* briefs, and taught as a Visiting Professor or Visiting Researcher in law schools in Scotland (1985), Japan (1988), Washington D.C., (1990-91), and Australia (2000). I taught Civil Procedure for a dozen years, teach Conflicts of Laws and a Seminar on the Origins of the Constitution, Family Law and other subjects.

[2] *See, e.g.*, Lynn D. Wardle, *The Quandary of Pro-life Free Speech: A Lesson from the Abolitionists*, 62 Albany L. Rev. 853-966 (1999); Lynn D. Wardle, *Cable Comes of Age: A Constitutional Analysis of the Regulation of "Indecent" Cable Television Programming*, 63 Denver U.L. Rev 521-95 (1986).

Clearly there are serious problems that must be openly discussed, thoughtfully considered and addressed with appropriate legislation and other solutions.

Thus, I begin by noting that some parts of S. 27 are appealing. For instance, I commend the codification of the Supreme Court's decision in the *Beck* case which permits non-union members to obtain a refund of the part of the agency fees they pay to unions that is used for political activities. Also, disclosure of who pays for issue ads reflects a sunshine principle that seems fair and has worked effectively (if not violating privacy). Clarification of the prohibition of political fundraising on federal property, and prohibition on contributions by foreign nationals also make sense in light of recent abuses. Raising campaign donation limits is also liberating and consistent with the best American political traditions of fostering political speech.

However, the main thrust of S. 27 is very disturbing, indeed threatening to the fundamental rights of individuals and groups of individuals to engage in the most essential kind of civic speech protected by the First Amendment, political speech. Efforts to curtail political speech are inconsistent with the highest standards and noblest traditions of Congress to protect the free speech rights of American citizens. S. 27 has serious constitutional problems.[3]

The problems of S. 27 lie in the effects and in the means. Key parts of S. 27 could significantly disadvantage and disempower the less-wealthy, and the less-popular. The method of achieving reform in S. 27 – curtailing political speech – is constitutionally suspect and raises very serious First Amendment issues.

Detrimental Effects on Ordinary (Not-Wealthy) American

S. 27 would disproportionately disadvantage the efforts of most lower- and middle-income Americans (ordinary American wage earners and retirees) to have their voices heard on important political issues during the crucial political election season. Most lower- and middle-income Americans cannot afford to buy broadcast time to express their viewpoints on issues that are important to them. In order to "buy into" the public debate in the broadcast and other media, they must pool their modest funds in order to purchase the time and outlets to express their viewpoints. They often do so by making contributions to organizations that espouse the viewpoints they cherish - issue advocacy organizations. By pooling the donations of their many less-affluent members and small donors such issue-advocacy organizations are able to speak for them in ways none of the individuals members or donors could afford. S. 27 would single out such organizations for excessive restriction of what the bill calls "electioneering communication." It would not apply the same restrictions to wealthy individuals. By singling out issue advocacy and common purpose organizations for speech restriction, S. 27 would gag the ordinary Americans who try to engage in political speech while leaving unrestricted the wealthy who can afford to buy such media time, and media corporations themselves who are unregulated (as *all* political speakers should be).

S. 27 also bans "coordinated activity" by these organizations, and gives that term an excessively broad definition. While efforts to circumvent campaign donation limits is a legitimate concern, the scope of the remedy proposed in S. 27 is excessive – like ordering the use of a cannon to get rid of a fly. The breadth of the "*anything of value* provided by a person *in connections with* a Federal election candidate's election"[4] is breathtakingly sweeping. It could include issue advocacy that has been long-protected from

---

[3] *See generally* James Bopp, Jr., Analysis of S. 27, "McCain-Feingold 2001" (Feb. 22, 2001); William P. Marshall, *The Last Best Chance for Campaign Finance Reform*, 94 Nw. U. L. Rev. 335 (2000)); James Bopp, Jr., *The Constitutional Limits on Campaign Contribution Limits*, 11 Regent U. L. Rev. 235 (1998); Bradley A. Smith, *Soft Money, Hard Realities: The Constitutional Prohibition on a Soft Money Ban*, 24 J. Legis. 179 (1998).

[4] S. 27, § 214(a)(1)(C), at 26.

regulation. The expansion of the definition of prohibited "coordination" to include activities that go far beyond prior communications about a specific expenditure that is effectively under the candidate's control or based on wishes or needs expressed by the candidate. It could effectively ban simple open, honest voluntary communication between citizen organizations and legislators or candidates because later issue advocacy by the organization would be deemed campaign expenditure by the candidate.

Detrimental Impact on Less-Popular Speech.

The impact of S. 27 would not only be felt disproportionately by the less-wealthy, but also by the less-popular. Persons espousing unpopular or controversial positions would be particularly disadvantaged. For example,[5] The Supreme Court (indeed, the federal judiciary in general) is in a quandary because of the persistent efforts of anti-abortion protesters to express opposition to the *Roe v. Wade*[6] doctrine of mandatory, legalized abortion-on-demand: In the last forty years, the Court has assumed special responsibility for protecting the free speech rights of individuals to protest official policies which they dislike, even when their position is unpopular with significant and influential segments of the populace. On the other hand, the Court itself is the creator of the controversial *Roe* rule which pro-life protestors criticize.

Thus, the Court is caught on the horns of a conflict of interest. It has assumed the special responsibility to protect unpopular political expression critical of established rules and institutions, but the rule that the anti-abortion protesters criticize is the Court's own creation and favored rule, and the institution the unpopular modern abolitionists threaten by their outspoken opposition is the Court itself. Given the conflict of interest, it is not surprising that the Court has repeatedly manifest a particular defensiveness, irritation, and hostility toward efforts to modify, restrict, curtail, oppose or repudiate even minor facets of the *Roe* abortion doctrine.[7] When it comes to pro-life protesters, the Court's decisions betray a clear double standard in which other protesters and demonstrators are given high protection but pro-life speakers are given a lower standard of protection.

When persons who create a rule of law are called upon to judge its constitutional validity, they have a conflict of interest. The drafters of the Constitution clearly rejected, and were especially concerned about mixing the power to make law with the power to judge the validity of the law.[8] The quandary that the founders sought to avoid the Supreme Court has created and embraced by virtue of its judicial lawmaking in *Roe*. That conflict of interest is very apparent in the cases involving restrictions upon the First Amendment rights of protestors criticizing and seeking to change the Court's *Roe* doctrine. The *Roe*-endorsing majority of the current Court cannot stop itself, when presented with an opportunity to uphold restrictions on pro-life speech that hinder and harass those unpopular critics.

The recent abortion free-speech cases decided by the Supreme Court are tragic evidence of the Court's inability to police itself to control its own biases against critics of abortion and of the *Roe* doctrine.[9] For example, in *Lawson v. Murray*,

---

[5]This is taken from *The Quandry of Pro-Life Free Speech*, supra note __. Most footnotes are omitted.

[6]410 U.S. 113 (1973).

[7]*See, e.g.*, Colautti v. Franklin, 439 U.S. 379 (1977); Thornburg v. American College of Obstetricians and Gynecologists, 476 U.S. 747 (1986); *See also* Beal v. Doe, 432 U.S. 440 (1977) (Blackmun, J., +2, dissenting); Webster v. Reproductive Health Services, 492 U.S. 490, 532 (Scalia, J., concurring); *id.* at 537 (Blackmun, J., +2, dissenting); *id.* at 560, 566 (Stevens, J., dissenting); *Casey*, 505 U.S. 833, ___, [112 S.Ct. At 2813] (O'Connor, Kennedy, & Souter, JJ., plurality).

[8]*See, e.g.*, James Madisons, Notes of the Debates in the Federal Convention of 1787 336-343, 461-466 (W.W. Norton issue 1987); The Federalist No. 78 (A. Hamilton) at 466 (New American Library 1961).

[9]*See, e.g., Hill v. Colorado*, 120 S.Ct. 2480 (2000) (upholding floating zone sidewalk counseling restriction); Schenck v. Pro-Choice Network, 519 U.S. 357 (1997) (stikes floating

[10] the Court declined to review an injunction against peaceful pro-life protesters that limited them to one or two hours a week upon 24-hours prior notice to the police. Justice Scalia, separately concurred because in his view "the currently disfavored class of antiabortion protestors" and their claims were unlikely to get a fair hearing before the Court. He added: "[E]xperience suggests that seeking to bring the First Amendment to the assistance of abortion protesters is more likely to harm the former than help the latter."[11]

As Professor Mary Ann Glendon of Harvard Law School has noted,[12] in stark contrast to even the most liberal European and Central European nations, the Supreme Court has severely limited the expression of American pro-life values regarding abortion through legislation. S. 27 would exacerbate that by severely curtailing the expression of pro-life values through political speech during elections.

Since the courthouse doors have been closed to the First Amendment claims of some advocates of causes unpopular with the judicial branch (such as critics of certain judicial decisions or practices), preserving their rights to participate fully in the electoral process by engaging in political issue advocacy speech is extremely important. S. 27 is a tragic step backward in that regard. It defies the traditional role that Congress has played in protecting free speech, particularly political speech. It will harm the advocacy of unpopular positions, especially by unpopular speakers, because there are few alternative avenues available for the expression of their viewpoints to the avenues that S. 27 restricts.

The Method Undermines the First Amendment

As important as campaign and finance reform is, it must not be achieved at the cost of undermining the First Amendment. There are several serious constitutional concerns about S. 27. I will mention just two.

As the Supreme Court declared a quarter-century ago in a seminal political speech case, the First Amendment "has its fullest and most urgent application precisely to the conduct of campaigns for political office."[13] One of the primary purposes of the First Amendment was "to protect the free discussion of governmental affairs, . . . of course, includ[ing] discussion of candidates."[14] The Constitution "guarantee[s] freedom to associate with others for the common advancement of political beliefs and ideas,"[15] and "[t]he First Amendment affords the broadest protections to [discussion of political issues and candidates] in order 'to assure [the] unfettered interchange of ideas for the bringing about of political and social changes desired by the people.'"[16] Laws which "may have the effect of curtailing the freedom to associate is subject to the closest scrutiny."[17] Because S. 27 would drastically curtail political expression and political association for expression, it raises serious First Amendment concerns. Those concerns could be avoided with more moderate, more careful drafting.

---

bubble zone but upholds fixed buffer zone even though content-motivated); National Organization of Women, Inc. v. Scheidler, 510 U.S. 249 (1994) (RICO laws applicable to peaceful pro-life demonstrators); Frisby v. Schultz, 487 U.S. 474 (1988) (upholding residential picketing ban); *see also* Madsen v. Women's Health Center, 512 U.S. 753 (1994) (striking and upholding parts of injunction against pro-life demonstrators); Bray v Alexandria Women's Health Clinic, 506 U.S. 263 (1993) (5-4 decision protecting pro-life demonstrators against civil rights suit for discrimination against women for opposing abortion).

[10] 515 U.S. 1110 (1998).

[11] *Id.*

[12] Mary Ann Glendon, Abortion and Divorce in Western Law (1987).

[13] Buckley v. Valeo, 424 U.S. 1, 14-15 (1976) (quoting Monitor Patriot Co. v. Roy, 401 U.S. 265, 272 (1971)).

[14] Mills v. Alabama, 384 U.S. 214, 218 (1966).

[15] Buckley, 424 U.S. at 15.

[16] Buckely, 424 U.S. at 14.

[17] Buckley, 424 U.S. at 24.

Second, in *Buckley v. Valeo*, the Court indicated that issue advocacy in election contexts may not be regulated; only express advocacy of election or defeat of a particular candidate may be regulated.[18] The Court has since then reaffirmed the express advocacy standard.[19] S. 27 violates the "express advocacy" bright line standard of *Buckley* and again appears to violate the First Amendment by attempting to restrict political speech that is not advocating the election of a particular candidate for a particular office.

Conclusion

"The very purpose of the First Amendment is to foreclose public authority from assuming a guardianship of the public mind through regulating the press, speech, and religion. In this field every person must be his own watchman for truth, because the forefathers did not trust any government to separate the true from the false for us."[20] Campaign financing abuses can be remedies without violating free speech values. The First Amendment forbids the government to do exactly what S. 27 attempts to do – restrict and regulate political speech by issue advocacy and voluntary association organizations of ordinary Americans attempting to express their views to influence the development of public policy through American elections. Thus, in its present form S. 27 should not be enacted.

---

[18]Buckley, 424 U.S. at 14, 43-44.

[19]FEC v. Massachusetts Citizens for Life, 479 U.S. 238, 249 (1986).

[20]Thomas v. Collins, 323 U.S. 516, 545 (1945) (Jackson, J., concurring).